BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TANGERA D. WALKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,018,220
NEBRASKA FURNITURE MART	)	
Respondent	)	
AND	)	
	)	
VIRGINIA SURETY COMPANY, INC.	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 8, 2004 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. The Administrative Law Judge (ALJ), after determining that there was just cause for claimant not having provided notice within 10 days as is required by K.S.A. 44-520, determined that claimant had provided notice within 75 days of her accident. Respondent argues that claimant failed to provide notice within 10 days and further argues that there was not just cause for claimant's failure to timely provide notice. Therefore, claimant should be denied benefits. In a strange twist, the ALJ, after finding in claimant's favor with regard to notice and just cause, went onto defer medical treatment for claimant's upper extremity complaints based upon claimant's receiving medical care through her husband's insurance company.

ISSUES

Did claimant provide timely notice of accident pursuant to K.S.A. 44-520? If not, was there just cause for claimant's failure to provide notice, thereby extending the appropriate notice time to 75 days from the date of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Preliminary Decision of the Administrative Law Judge should be affirmed, although for different reasons.

Claimant began working for respondent on its loading and unloading dock in September of 2003. Her job was upper extremity intensive and required a great deal of physical hand labor. In early 2004, in either January or February, she began developing problems in her right hand.

Claimant testified she discussed her hand symptoms, including numbness in her fingers, with both her manager, Gary Fuller, and her supervisor, Ken (last name unknown). Neither the manager nor the supervisor testified in this matter.

Claimant acknowledged she did not specifically state that this condition was work related, but did discuss on several occasions the numbness in her fingers, indicating that she was complaining "to everybody."[1] On February 18, 2004, claimant went to Dr. Schwegler, her family doctor. In Dr. Schwegler's medical note, which is only partially legible, it is noted that claimant was having numbness in her right hand times three weeks. There is an indication that claimant was performing a heavy job for the past eight months "wrapping." Apparently, based on the information she provided to the doctor, claimant had determined that there was some connection between her hand complaints and the heavy work performed at her job.[2]

As neither claimant's manager nor supervisor testified in this matter, it is unclear exactly what was discussed between them and claimant, other than the fact that she was having difficulties with her hand, including numbness in her fingers. But it appears to have been implicit in these discussions that her work activities were at a minimum aggravating her symptoms.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[3]

K.S.A. 44-520 requires that notice be provided within 10 days of a date of accident. In this instance, claimant's condition developed over a period of time. Therefore, the appropriate date of accident would be claimant's last day worked.[4] From the record, it appears claimant's last date of employment was March 19, 2004, as she was terminated on March 21, 2004, for excessive attendance problems, including no call/no shows on March 20 and 21. Therefore, the appropriate date of accident would be March 19,

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[1] P.H. Trans. at 11.

[2] P.H. Trans., Cl. Ex. 1 at 5.

[3] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[4] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

2004, with claimant having had discussions with both her manager and supervisor before that time.

The Board finds for preliminary hearing purposes that claimant did provide notice of accident to her manager and supervisor prior to her termination of employment, thus satisfying the requirements of K.S.A. 44-520. The issue of just cause need not be determined by the Board at this time.

As is always the case, preliminary hearing findings are not binding in a full hearing on the claim, but are instead subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated October 8, 2004, should be, and is hereby, affirmed, although on different grounds.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director